

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

77-4204

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-4204

CHI YIM WU,

Petitioner,

—against—

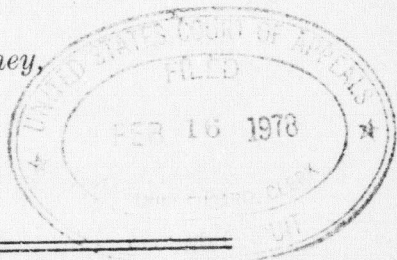
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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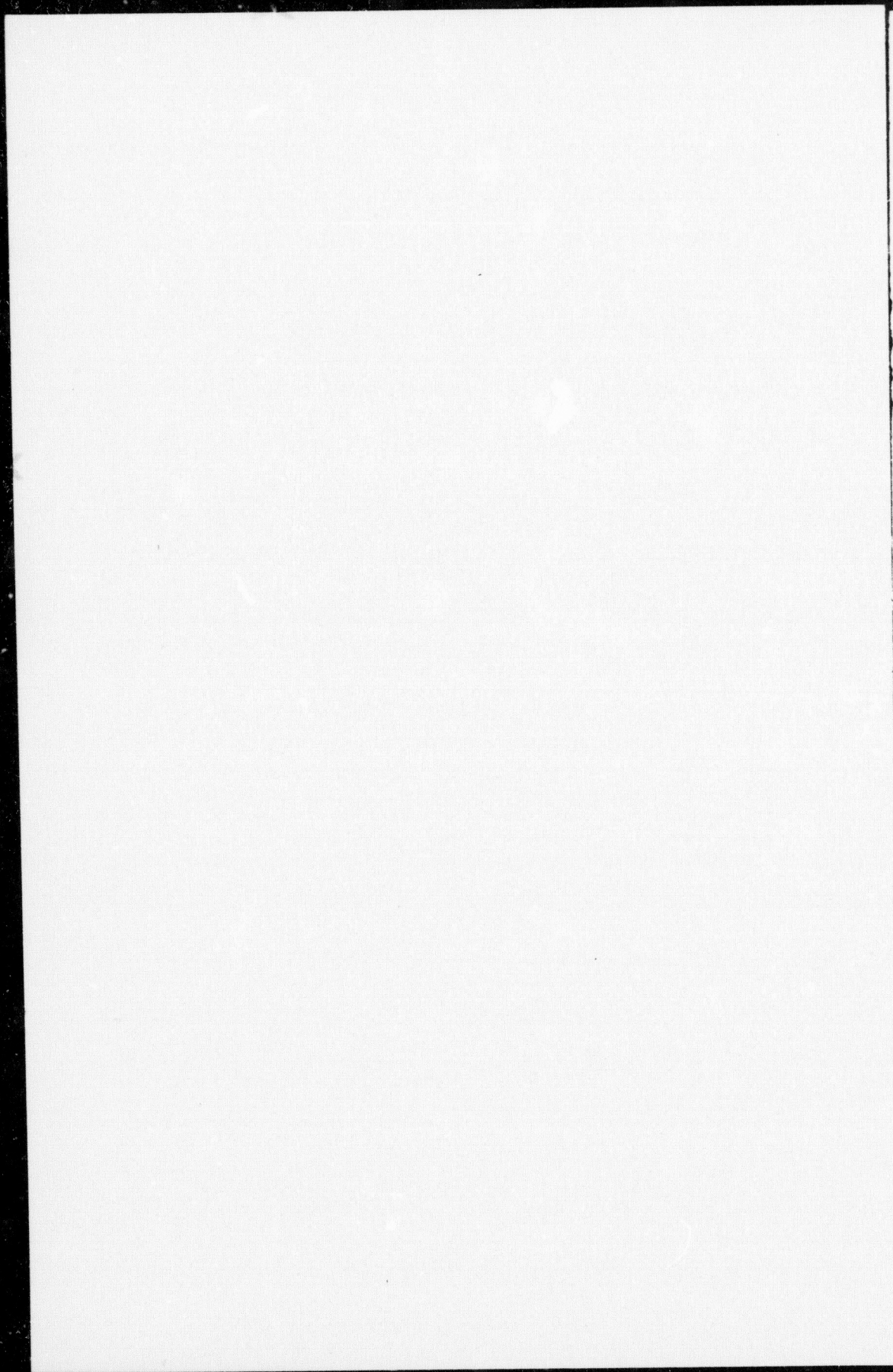


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4204

CHI YIM WU,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Issue Presented

Was the alien given a fair and impartial hearing in the deportation proceedings below.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Chi Yim Wu (the "petitioner", "Wu", the "alien") petitions this Court to review a final order of deportation entered by the Board of Immigration Appeals (the "Board") on October 27, 1977. That order dismissed the alien's appeal from the order and decision of Immigration Judge Alexander Schonfeld wherein Judge Schonfeld found Wu deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), because Wu had been admitted as a non-immigrant crewman, authorized to remain in the United

States for a period not to exceed twenty nine days, and failed to depart at the expiration of his authorized visitation.

At the commencement of the administrative proceedings below the alien's initial claim was that he had been arrested by the Immigration and Naturalization Service ("Service") officers in violation of the Fourth Amendment. Therefore he claimed that all statements, documents and other proof obtained as a result of this arrest should be suppressed. At the conclusion of the deportation proceeding the alien's attorney claimed that it was error to deny the alien's motion to suppress and that the presiding Immigration Judge had failed to recognize counsel's right to invoke, on behalf of his alien-client, the Fifth Amendment privilege against self-incrimination. On appeal to the Board Wu's attorney claimed that it was error for an Immigration Judge to question the alien after the attorney had indicated that his client wished to remain mute, and, alternatively, that the Immigration Judge should have informed Wu of his privilege against self-incrimination prior to questioning the petitioner during the administrative hearing below. On appeal to this Court the alien claims his motion for a separate suppression hearing was not properly considered and alleges that Wu's concessions of alienage and deportability during the deportation hearing below were neither given "freely" or "voluntarily" and should therefore be "suppressed as illegally obtained."

The alien seeks this Court to reverse the order of the Board of Immigration Appeals and remand the matter for a *de novo* deportation hearing. Since the filing of this petition for review Wu has enjoyed the automatic stay of deportation provided by Section 106(a) of the Act, 8 U.S.C. § 1105a(a).

Statement of Facts

Chi Yim Wu is a native of China and a citizen of the Republic of China on Taiwan who was admitted to the United States on or about December, 1969, as a nonimmigrant crewman. He was authorized to remain in this country during the period his vessel was in port but, in any event, not to exceed a period of twenty nine days (AR. pp. 66-68).¹ Wu deserted his vessel and has continued his illegal sojourn and employment in this country since his admission to the United States in violation of the provisions of the immigration law. Wu was apprehended by Service investigators on June 6, 1976 while in the kitchen area of the Twin Dragon Restaurant in Bronx, New York. Wu, upon inquiry by the investigators, answered questions relating to his nationality and alien status and gave the Service officers his passport. He was thereafter taken to the Service's district headquarters in Manhattan (AR. pp. 54, 58). On June 7, 1976 the Assistant District Director for the Service's New York district issued an Order to Show Cause and Notice of Hearing charging that Wu was a citizen of the Republic of China who had been admitted as a non-immigrant crewman and who overstayed his authorized visitation thereby rendering him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (AR. pp. 79-80). On June 11, 1976, after a hearing before an Immigration Judge, the alien, after posting an immigration appearance bond, was released from Service custody pending his eventual deportation hearing (AR. p. 78).

On August 4, 1976, Wu appeared at his deportation hearing accompanied by privately retained counsel (A.R. p. 61). The Service provided an official interpreter to

¹ References preceded by the letters "AR" are to the pages of the Certified Administrative Record previously filed with the Court.

insure full and complete comprehension of the proceedings.² At the commencement of the hearing Judge Schonfeld placed the alien under oath and requested him to identify himself. This inquiry was then interrupted by the alien's counsel,³ who sought to submit a motion for a separate suppression hearing (AR. p. 62).⁴ Inasmuch as the proceeding had not yet begun, *i.e.*, the alien had not yet identified himself nor had a plea been entered to the charges, Judge Schonfeld advised Wu's attorney that his

² The alien advised Judge Schonfeld that he spoke Chinese in the Shanghai dialect and that he understood the interpreter who had an opportunity to converse with the alien (A.R. p. 63).

³ In light of the record containing a verbatim transcript of the proceedings before Judge Schonfeld and present counsels' lack of first hand knowledge of those proceedings the Government strongly disagrees with the colorful, but we submit, inaccurate descriptions of the proceedings. For example, while Petitioner's brief emphasizes Wu's unfamiliarity with the English language, the inability of the interpreter to translate the interruptions of counsel, and the absence of anything in the record to show the alien's understanding of the proceedings (Petitioner's Brief p. 20), we respectfully submit the record demonstrates that the alien understood the interpreter; that it is clear he understood the nature of the proceedings and the questions posed by Judge Schonfeld. The record in this case speaks for itself. Wu's testimony was certainly not the result of an "intense barrage of hostile questioning".

⁴ In his motion Wu alleged that he was arrested by Service officers in violation of his Fourth Amendment privileges and therefore sought to suppress all statements, documents, and other proof obtained by the Service as a result of Wu's arrest and interrogation. Judge Schonfeld's decision to postpone consideration of this motion until after the alien had entered a plea to the charges and the Government had begun to present evidence in support of its case was entirely proper. Even though Wu's counsel sought "suppression," there was simply no evidence to suppress at this point in the proceedings. See *Katris v. Immigration and Nationalization Service*, 562 F.2d 866, 869 (2d Cir. 1977).

motion was premature but that he could resubmit his motion during the evidentiary hearing (AR. p. 62). Thereafter, the alien identified himself and advised Judge Schonfeld that he understood the interpreter and was represented by an attorney. Through his attorney, Wu acknowledged service of the Order to Show Cause, waived the formal reading of the allegations, but refused to admit the truth of those allegations (AR. p. 63). Because, the alien's attorney had thereby contested Wu's alienage and deportability, Judge Schonfeld proceeded to take the alien's plea as to the separate factual allegations contained in the Order to Show Cause⁵ as required by 8 U.S.C. § 242.16(b). (AR. p. 64 line 2).⁶ Upon Judge Schonfeld's

⁵ The allegations contain in the Order to Show Cause were:

"UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of China and a citizen of the Republic of China on Taiwan;
3. You entered the United States at New York, N.Y. on or about 12/69;
4. At that time you were admitted as a non-immigrant crewman authorized to remain in the United States for the period of time your vessel remained in port not to exceed 29 days;
5. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of said act you remained in the United States for a longer time than permitted."

⁶ 8 C.F.R. § 242.16(b) provides:

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allega-

[Footnote continued on following page]

inquiry as to the first factual allegation Wu's attorney objected. This objection was not directed at Judge Schonfeld's taking of the plea on that allegation, but was made in order to renew his motion for a separate suppression hearing (AR. p. 64 lines 7-19).⁷ Judge Schonfeld

tions and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent. The special inquiry officer shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the special inquiry officer may not accept an admission of deportability, he shall direct a hearing on the issues.

IMMIGRATION JUDGE: I'll ask the respondent questions on the Order to Show Cause.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Is it true, Mr. Wao Tse Chen that you are not a citizen or national of the United States?

A. What?

Q. Is it true that you are not a citizen of the United States or national?

MR. QUANE: I object to the question. I would like . . .

IMMIGRATION JUDGE: You object to my question?

MR. QUANE: Yes, your honor, it is respectfully objected.

IMMIGRATION JUDGE: Are you objecting to the Order to Show Cause form?

MR. QUANE: No, before you get into that, your honor, I would like to submit a motion . . .

IMMIGRATION JUDGE: Well, let him answer. First I want to go ahead with the deportation hearing and then if you feel that you do not want to concede deportability it's one thing, but I want to establish some of the elements of the Order to Show Cause before me proceed. Maybe there is no need for your motion.

MR. QUANE: . . .

again explained that the submission of such a motion would be premature at that point and further explained that since Wu's attorney elected to contest deportability that he would continue to take the alien's plea on the individual factual allegations before proceeding further with the hearing.⁸

Wu's attorney then informed Judge Schonfeld that he had advised his client not to answer Judge Schonfeld's question (AR. p. 65 line 5).⁹ Before permitting the Service to proceed with its case Judge Schonfeld advised the alien and his counsel that he wished to establish that Wu was going to remain silent since he had nothing but counsel's representation to that effect (AR. p. 65). Furthermore, Judge Schonfeld advised the alien and his attorney that he would continue to take the alien's plea and that the alien could "*choose to answer or remain mute*" during this inquiry (AR. p. 65 lines 24-5).

Thereafter, in response to Judge Schonfeld's inquiry as to the factual charges and despite Judge Schonfeld's advice that the alien could remain mute, Wu testified that he had "jumped ship to the United States" (AR. p. 66 line 5); that he did not have citizenship in the United

⁸ As Judge Schonfeld properly noted there might not be a need for a suppression motion during that hearing. For example, if the Service elected to prove its case with preexisting Service documentation such a motion might prove unnecessary. See *Tsao v. I.N.S.*, 538 F.2d 667 (5th Cir. 1976) *United States v. Martinez*, 512 F.2d 830, 832 (5th Cir. 1975). In fact, this appears to be manner in which the Service attorney had elected to proceed but in light of Wu's later admissions this process proved unnecessary (A.R. p. 65 lines 12-15).

⁹ Counsel's representation concerning his client's silence does not appear to have been the result of a fear of self-incrimination but rather an effort to avoid a voluntary concession of deportability thereby rendering his motion to suppress ineffective. See *Katris v. Immigration and Naturalization Service*, 562 F.2d 866 (2d Cir. 1977); *Avila-Gallegos v. Immigration and Naturalization Service*, 562 F.2d 666 (2d Cir. 1975).

States (AR. p. 66 line 14); that he was born in China and was a citizen of that country (AR. p. 67 lines 5-11); and that he had remained in the United States beyond his authorized visitation of twenty nine days (AR. p. 67 line 19).¹⁰

Based on these admissions Judge Schonfeld found that Wu had conceded his alienage and deportability and thereafter denied the alien's motion for a separate suppression hearing. Judge Schonfeld then asked Wu's counsel if alienage and deportability were to be conceded. In response Mr. Quane merely responded: "At this point I am not willing to concede because, your honor I just don't want to concede at this point." (AR. p. 68 lines 8-9). Thereafter the Service trial attorney sought a recess in the proceedings.¹¹

After the recess Wu's attorney, while stating that the application was "a little bit late" (AR. p. 68 line 24), for the first time in the proceeding mentioned the Fifth Amendment privilege against self-incrimination and belatedly raised the issue of whether an attorney can invoke the privilege on behalf of his client (AR. p. 68 lines 23-26, p. 69 lines 1-3).

Wu thereafter requested and received the discretionary privilege of voluntary departure in lieu of enforced de-

¹⁰ After Wu's admission that he had "jumped ship" his attorney made no attempt to advise his client not to answer further. Instead, Wu's attorney sought a recess (too little, too late).

¹¹ At this point in the hearing, alienage and deportability having been determined, the only issues remaining were whether Wu would be granted voluntary departure pursuant to 8 C.F.R. § 244.1 and whether any other requests for discretionary relief might be available. See C.F.R. § 242.17. While petitioner's counsel decries the granting of a recess at this point it is obvious that the recess was requested for the benefit of the alien and in order to discuss the availability of discretionary relief.

portation.¹² His attorney advised Judge Schonfeld that he would appeal the denial of his motion for a separate suppression hearing as well as the issue as to whether he could have invoked the privilege of self-incrimination on behalf of his client and thereby precluded Judge Schonfeld from taking the alien's plea under 8 C.F.R. § 242.16(b).

On August 9, 1976 the alien filed an appeal from Judge Schonfeld's decision with the Board of Immigration Appeals. The notice of appeal specified two grounds upon which reversal was sought. First, it was claimed that the Immigration Judge should not have questioned Wu after counsel indicated that the alien would remain mute. Second, it was urged that the Immigration Judge should have informed Wu that he could remain silent prior to questioning him.

On November 17, 1976 Wu, by his attorneys, submitted a sixth preference visa application to the Service's New York district office (A.R. p. 20-37).¹³ Together with this petition Wu submitted two approved labor certificates and evidence of his prior employment and experience as a Chinese cook. These documents identified him as Chi Yim Wu a/k/a Wao Tse Chen a native of China who had

¹² See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted where the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and facilitates any future lawful entry into this country he might wish to make. Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17).

¹³ This documentation was received after the deportation hearing had been completed. As such it was not a part of the record upon which Judge Schonfeld rested his finding. Furthermore, although this documentation was submitted voluntarily by the alien to the Service the Board limited its appellate review to the facts and evidence presented at the deportation proceeding.

been admitted to the United States on December 1969 as a non-immigrant crewman. The documentation indicates that Wu had been illegally employed since his admission to the United States and had at least on one occasion prior to his arrest attempted to utilize that employment as a basis upon which to obtain permanent resident status. (AR. p. 28-29).¹⁴

On February 22, 1977, after three adjournments (AR. p. 17-20), Wu's present attorney argued his appeal before the Board (AR. p. 8-15) claiming *inter alia* that: (1) the filing of a motion to suppress based upon allegations of an illegal arrest mandated an immediate and separate hearing even though the alien had not yet entered a plea to the deportation charges and even though the Government had not even commenced its case and presented any evidence; (2) that the presiding Immigration Judge had illegally extracted a confession of alienage and deportability despite counsel's objections which should have been construed as an invocation of the Fifth Amendment; (3) that this "extracted" admission was legal error because the alien was not advised of his right to remain silent;¹⁵

¹⁴ The administrative record does not reflect whether the first labor certification submitted on Wu's behalf by the Yangtze Restaurant was the basis of the Service's investigation and subsequent apprehension of Wu at his present place of employment.

Although Wu had alleged in his affidavit in support of a separate suppression hearing that he was "merely sitting" in the kitchen area of the Twin Dragon Restaurant at the time of his apprehension, his current labor certification from that employer indicates that Wu was in fact a kitchen employee prior to, at the time of, and subsequent to his apprehension by the Service.

¹⁵ Counsel's assertion that Wu should have been advised that he could remain silent is the cornerstone of Wu's argument in this case. Nonetheless, a careful review of the record would demonstrate that there is no factual or legal basis to support the contentions made before the Board or in this petition for review. As we noted *infra*, prior to examining the alien on the allegations contained in the Order to Show Cause Judge Schonfeld specifically advised counsel and Wu that the alien could answer or remain mute to this inquiry (AR. p. 65 line 24-5).

(4) despite the fact that Wu was represented by counsel of his choice and had the opportunity to confer with counsel prior to the hearing, the hearing was nonetheless defective because it required the alien to be "a constitutional lawyer and respond to every question with a specific invocation of the 5th Amendment." (AR. p. 15);¹⁶ In conclusion the alien argued that the [e]vidence obtained to support deportability was "tainted" and "obtained in violation of the Fourth and Fifth Amendments of the United States Constitution". Therefore, he argued, the evidence should be suppressed and a *de novo* hearing granted (AR. p. 52).

On October 27, 1977 the Board rendered its decision affirming Judge Schonfeld's finding of alienage and deportability and denied the alien's motion to terminate the proceedings (AR pp. 3-7). In its opinion the Board noted that: (1) Judge Schonfeld was authorized under 8 C.F.R. § 242.16(b) to require the alien to plead to the Order to Show Cause by stating whether or not he admits or denies the charges contained therein; (2) although the

¹⁶ We note at this point that Wu had been continuously represented by the same law firm from at least June 28, 1973 (AR. p. 29). In view of this long standing relationship with regard to Wu's immigration problems and, the ample time afforded his lawyers to confer with Wu prior to the date of the hearing we can hardly agree with the petitioner that he was unable to stand mute and was deprived of assistance of counsel. An alien need not be a constitutional lawyer or require long periods of preparation if his attorney simply advises him not to answer any questions. On the other hand, if petitioner's argument in this regard is meant to imply that continuous recesses are necessary in order that an alien might confer with his attorney as to which particular questions he would answer, this argument is equally unpersuasive. Wu could not simply pick and choose those questions he would answer since partial or incomplete testimony at the hearing would be a waiver of any privileges. See *Brown v. United States*, 356 U.S. 148 (1958); *Rogers v United States*, 340 U.S. 367 (1951).

Fifth Amendment protects witnesses testifying in deportation proceedings from giving evidence which would tend to show guilt under a federal criminal statute, in this case the privilege was never invoked by the alien and the first time the issue arose was in counsel's argument after Wu had admitted deportability; (3) by making these admissions Wu had waived any right to invoke the privilege against self-incrimination; (4) the Government is not required to advise an individual of his right to invoke or waive that privilege; (5) it was within Judge Schonfeld's discretion authority to grant a recess and that he had not abused that authority under the circumstances. The Board granted the alien an additional thirty days to effect his voluntary departure, and alternatively, provided that should Wu fail to exercise this privilege in a timely fashion he would be deported as provided in Judge Schonfeld's order (AR. pp. 2-7). By letter of November 7, 1977 the Service's New York District Director notified Wu to effect his departure, in accordance with the Board's decision, on or before November 27, 1977 (AR. p. 1). On November 23, 1977 the alien filed this petition for review and thereby gained an automatic statutory stay of deportation.¹⁷

¹⁷ The filing of this petition only four days before the expiration of the voluntary period is no coincidence in immigration law. Waiting until the last possible moment to seek review or make a new application for relief allows the alien additional time to remain in the United States. For some aliens this tactic brings them closer in time to the approval of a visa petition and thereafter an application for adjustment of status under Section 245 of the Act, 8 U.S.C. § 1255. In the case of a deserting crewman who is statutorily ineligible for adjustment of status and who must in any event procure his visa abroad this eleventh hour strategy enables him to continue his illegal employment in the United States until a visa becomes available at a consulate abroad. See e.g. *Fan Wan Keung v. I.N.S.*, 434 F.2d 301 (2d Cir. 1970).

ARGUMENT

Wu's Admissions Given During The Course Of His Deportation Proceeding Provided Clear, Convincing, Unequivocal And Admissible Evidence Upon Which A Valid Finding Of Deportability Was Based.

Petitioner claims that his testimony at the deportation hearing was equivalent to a "coerced" confession which was improperly obtained by the presiding Immigration Judge because Judge Schonfeld failed to grant a recess during the deportation hearing. Interwoven within this argument is petitioner's second claim that his "motion to suppress unlawfully obtained evidence" was denied without having been properly considered by the Immigration Judge. Thus, the petitioner concludes that his testimony at the deportation hearing cannot form a legally valid basis upon which to find alienage and deportability because it would violate the alien's Fourth and Fifth Amendment rights.

Without more, the record in this proceeding belies petitioner's arguments and is sufficient to reject them outright. It is quite clear that Wu had been represented by counsel long before the actual proceeding commenced and that he had more than ample opportunity to be advised by his attorneys of the advantages and disadvantages of remaining mute. It is also evident that Judge Schonfeld was empowered to take the alien's plea at the commencement of the hearing and that the pleas and admissions were neither coerced nor given as the result of official intimidation.

As the Board properly noted in its decision (A.R. p. 5) immigration judges are required to take an alien's plea at the commencement of the hearing by requiring the alien

to state whether he admits or denies the factual allegations and the charges of deportability contained therein. 8 C.F.R. § 242.16(b).¹⁸

In this case Wu, despite Judge Schonfeld's advice that he could remain mute and without objection from his attorney, responded to the allegation concerning citizenship with a voluntary admission that he was a deserting crewman. (A.R. p. 66):

"Immigration Judge:

Q. Mr. Woa Tse Chen, is it true that you are not a citizen or national of the United States?

¹⁸ Pursuant to its plenary powers over immigration related matters, Congress specifically empowered immigration judges with the authority to take sworn testimony and examine the subject of a deportation proceeding regarding alienage and deportability. See Section 235(a) of the Act, 8 U.S.C. § 12225(a); *Laqui v. I.N.S.*, 422 F.2d 807 (7th Cir. 1970); *Sherman v. Hamilton*, 295 F.2d 516 (1st Cir. 1961), *cert denied*, 369 U.S. 820 (1962); *Medeiros v. Brownell*, 240 F.2d 634, 635 (D.C. Cir. 1957) (alien's admission of alienage and deportability over objection of counsel held sufficient to establish deportability); *U.S. v. Vivian*, 224 F.2d 53 (7th Cir. 1955) See also *Graham v. United States*, 99 F.2d 746 (9th Cir. 1938); *Loufakis v. United States*, 81 F.2d 966 (3rd Cir. 1936).

Nonetheless, even if Wu had remained silent and did not voluntarily concede alienage and deportability at the time his plea was taken such testimonial recalcitrance would not save him from the proper operation of Section 242 of the Act, 8 U.S.C. § 1252. Since alienage is not an admission of criminal guilt, an alien has no constitutional right to remain silent during a hearing on this issue or his right to be or remain in the United States. In fact, Section 291 of the Act, 8 U.S.C. § 1361 places the burden upon the alien to show the time, place and manner of entry into the United States. Furthermore, the failure to sustain that burden of proof creates a presumption that the person is in the United States in violation of the law. Finally, an alien's silence with regard to these matters may be deemed tantamount to an admission of the facts. *Vajtauer v. Commissioner*, 273 U.S. 103 (1927); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); See also *Baxter v. Palmigiano*, 425 U.S. 309 (1975).

A. I don't know.

Q. Well you are a citizen of the United States?

A. I jumped ship to the United States."

Leaving aside the question that this statement in and of itself waived any privilege from self-incrimination,¹⁹ it is clear that this admission was voluntary. We see no reason why counsel did not immediately advise his client to remain silent. Despite the fact that Judge Schonfeld's inquiry was first presented in English and then had to be translated for Wu, petitioner's brief does not even address the question of why counsel, during this period, did not merely turn to his client and advise him to remain silent. It was only after this admission of deportability that counsel sought a recess, and then he did so without explaining the legal basis for that request.

The record demonstrates that this testimony was not the result of official intimidation, *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960); or caused by the illegal imposition of a choice between silence and forfeiture of a protected right. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967). Rather they were disclosed as a result of a "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California*, 314 U.S. 219, 241 (1947).²⁰

¹⁹ See *Brown v. United States*, 356 U.S. 148 (1958); *Rogers v. United States*, 340 U.S. 367 (1951).

²⁰ Petitioner attempts to distinguish his situation from that of the aliens in *Avila Gallegos v. I.N.S. supra*, and *Katris v. I.N.S. supra*, by stating that they had "freely given testimony at their deportation hearing then sought to invalidate the orders of deportation on the grounds that Service misconduct voided all subsequent proceedings." (Petitioner's Brief p. 15). This analysis is simply incorrect. In both of the above-mentioned cases the alien's counsel had interposed objections on behalf of his client prior to the alien's testimony. The presiding Immigration Judges examined

[Footnote continued on following page]

Alternatively, even if it were assumed that request for a recess had been arbitrarily denied prior to the alien's admissions, or that the petitioner had been forced to testify despite a proper invocation of the privilege against self-incrimination,²¹ the facts in this case would not require a remand for the demanded *de novo* hearing. It is clear that the Government's concern in this matter is the proper enforcement of the immigration laws rather than the enforcement of related federal criminal provisions. Even if Wu's testimony had been compelled, his remedy in this case is not a remand for a *de novo* administrative hearing which would only prolong his illegal sojourn and employment.

The Fifth Amendment privilege protects an individual from disclosures which would incriminate him in a criminal offense. See *Hoffman v. United States*, 341 U.S. 479 (1951). However, despite its consequences, the Courts have consistently adhered to the view that deportation, being civil in nature, is not a crime. See *Oliver v. U.S. Department of Justice*, 517 F.2d 426, 428 (2d Cir.), *cert.*

the aliens as to their deportability over counsel's objection and that testimony became the basis of the finding of deportability which was affirmed by this Court on review. See Respondent's Briefs in *Avila Gallegos v. I.N.S.*, Docket No. 74-2647; *Katris v. I.N.S.*, Docket No. 77-4072 (2d Cir. 1977). See also *Medeiros v. Brownell*, 240 F.2d 634 (D.C. Cir. 1957) (alien's admission obtained over objection of counsel).

²¹ The privilege in this case was never invoked by the petitioner at any time during the proceeding. Although there is precedent that no specific language is required to invoke the privilege so long as it is clear that the witness wishes to assert the claim, *Quinn v. United States*, 349 U.S. 155 (1955), we submit that the claim is a personal one which must be invoked by the witness himself. Petitioner has conceded this point in his brief. (Petitioner's Brief p. 7). See also, *United States v. Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969) (target of a grand jury required to appear despite the fact that his counsel had previously notified the government that his client would assert the privilege against self-incrimination and would refuse to testify).

denied, 423 U.S. 1056 (1975); *Santelises v. Immigration and Naturalization Service*, 491 F.2d 1254 (2d Cir. 1974); *Buckley v. Gibney*, 332 F. Supp. 790 (S.D.N.Y.), *aff'd* on opinion below, 449 F.2d 1305 (2d Cir. 1971), *cert. denied*, 405 U.S. 915 (1972); *Cortez v. Immigration and Naturalization Service*, 395 F.2d 965 (5th Cir. 1968); *United States ex rel. Circella v. Sahli*, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 384 U.S. 965 (1955). Thus an alien cannot invoke the privilege against self-incrimination merely because he faces the civil consequences of deportation. Further, where the admission of the underlying charge of deportability may incriminate the alien in a federal criminal offense his allegedly compelled testimony may still not require the relief that Wu seeks in this petition.

Wu has on a number of occasions disclosed facts which warrant his deportation. His remedy in this case is not a *de novo* hearing. Rather, Wu would have the opportunity to raise his objection concerning compelled testimony in a motion to suppress within the speculative criminal proceedings he has mentioned in his brief. As the Supreme Court stated in *United States v. Blue*, 384 U.S. 251, 255 (1966):

Even if we assume that the government did acquire incrimination evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.

Blue is foreshadowing authority for the proposition that, in a situation such as this case, where the Federal government seeks to enforce the immigration law rather than criminal statutes against an illegal alien, his proper remedy even if compelled to testify over a valid claim of privilege is a motion to suppress at the time criminal proceedings are instituted.

Finally, assuming *arguendo* that the judicially created exclusionary rule is applicable when an alien alleges an illegal arrest, search, and seizure in deportation hearing,²² Judge Schonfeld did not err in postponing consideration of Wu's motion at the commencement of the hearing. At the point in the proceeding when Wu's attorney sought to submit the motion there was simply no evidence to suppress and, as Judge Schonfeld noted, there might not be a need for such a motion until the Service began its presentation of evidence.²³ When, at the conclusion of the hearing, Judge Schonfeld denied the motion for a separate suppression hearing Wu's admissions formed a sufficient ground for the finding of deportability. At that point of the proceedings, there was simply no basis for a suppression hearing. *Katris, supra*; *Avila-Gallegos, supra*.

²² Although this argument was raised and briefed in *Katris v. I.N.S.*, 562 F.2d 866 (2d Cir. 1977), the facts in that case did not require this Court to decide that issue. Similarly, the facts in this case do not require the resolution of that issue at this time. It remains the government's position that exclusionary rule is not applicable to purely civil deportation proceedings. See, Respondent's Brief, *Katris, supra*.

²³ See footnote 8 *supra*.

CONCLUSION

The Petition for Review should be dismissed.

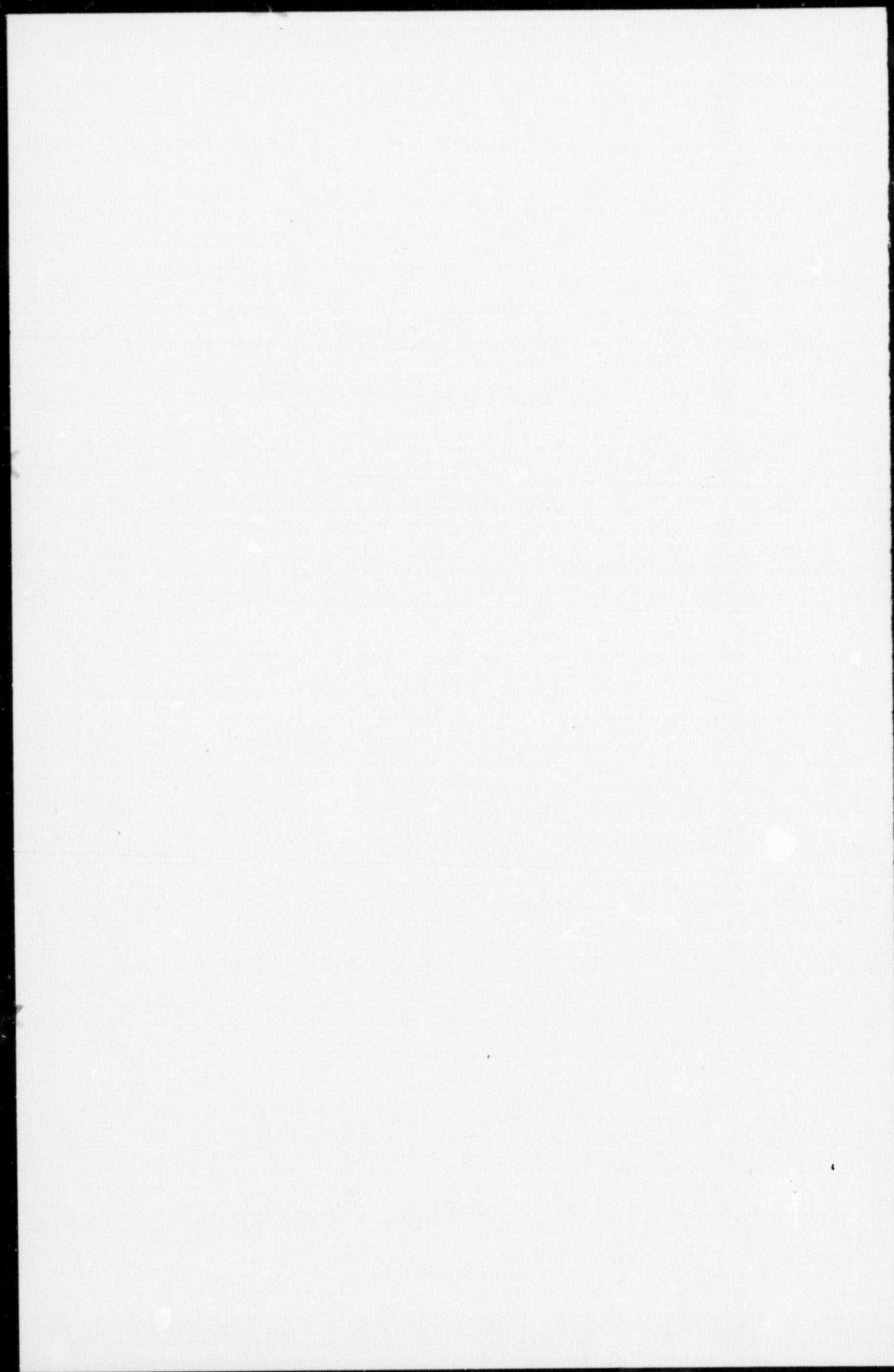
Dated: New York, New York
February 13, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
 two copies
16th day of February 19 78 she served ~~an~~ copy of the
within Brief for Respondent

by placing the same in a properly postpaid franked envelope
addressed:

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515 Madison Avenue
New York, New York 10022

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says she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

sworn to before me this

Marian J. Bryant

16th day of February, 1978

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4032301
Qualified in New York County
Commission Expires March 30, 1978